No. 17-1307

In the Supreme Court of the United States

DENNIS OBDUSKEY, PETITIONER

v.

MCCARTHY & HOLTHUS LLP, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

DANIEL L. GEYSER
Counsel of Record
GEYSER P.C.
One Energy Square
4925 Greenville Ave., Ste. 200
Dallas, TX 75206
(214) 800-2660
daniel.geyser@geyserpc.com

TABLE OF CONTENTS

Page

Introduction 1

Argument 2

Non-judicial foreclosure consitutes debt collection under the FDCPA 2

A. According to the Act's plain and ordinary meaning, non-judicial foreclosure qualifies as "debt collection" 2

B. The FDCPA's context and purpose confirm that non-judicial foreclosure is subject to the Act 15

C. The FDCPA's legislative history further confirms that non-judicial foreclosure qualifies as debt collection 17

D. The FDCPA does not intrude in any meaningful way on any traditional state interest 19

Conclusion 22

TABLE OF AUTHORITIES

Page

Cases:

Alaska Trustee, LLC v. *Ambridge*, 372 P.3d 207 (Alaska 2016) 1, 8

BFP v. *Resolution Trust Corp.*, 511 U.S. 531 (1994) 19

Cohen v. *Rosicki & Assocs., P.C.*, 897 F.3d 75 (2d Cir. 2018) 16

Heintz v. *Jenkins*, 514 U.S. 291 (1995) 8, 15, 21

Ho v. *ReconTrust Co., N.A.*, 858 F.3d 568 (9th Cir. 2017) 9, 15

James v. *Ford Motor Credit Co.*, 47 F.3d 961 (8th Cir. 1995) 12

Page

Cases—continued:

Johnson v. *Home State Bank*, 501 U.S. 78 (1991) 14
Kaymark v. *Bank of Am., N.A.*, 783 F.3d 168 (3d Cir. 2015) 14
McCray v. *Fed. Home Loan Mortg. Corp.*, 839 F.3d 354 (4th Cir. 2016) 6
McLaughlin v. *Phelan Hallinan & Schmieg, LLP*, 756 F.3d 240 (3d Cir. 2014) 7
Mount Lemmon Fire Dist. v. *Guido*, 139 S. Ct. 22 (2018) 10, 20
Piper v. *Portnoff Law Assocs., Ltd.*, 396 F.3d 227 (3d Cir. 2005) 10
Romea v. *Heiberger & Assocs.*, 163 F.3d 111 (2d Cir. 1998) 4
Sheriff v. *Gillie*, 136 S. Ct. 1594 (2016) 20

Statutes:

Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. 1692-1692p ..... *passim*
15 U.S.C. 1692(b) 4
15 U.S.C. 1692a(2) 7
15 U.S.C. 1692a(5) 9, 13
15 U.S.C. 1692a(6) ..... *passim*
15 U.S.C. 1692a(6)(C) 4
15 U.S.C. 1692c 20
15 U.S.C. 1692e(11) 4, 21
15 U.S.C. 1692e(2) 5, 17
15 U.S.C. 1692f(1) 5, 17
15 U.S.C. 1692f(6) ..... *passim*
15 U.S.C. 1692g 17, 21
15 U.S.C. 1692g(d) 4, 21
15 U.S.C. 1692g(e) 3
15 U.S.C. 1692i(a)(1) ..... *passim*
15 U.S.C. 1692i(a)(2) 16
15 U.S.C. 1692m(a) 15

Page

Statutes—continued:

15 U.S.C. 1692n 20
Colo. Rev. Stat. § 38-38-103 7
Colo. Rev. Stat. § 38-38-111 8

Miscellaneous:

Consumer Financial Protection Bureau, *Fair Debt Collection Practices Annual Report 2013* (Mar. 20, 2013) 15
David A. Dana, *Why Mortgage "Formalities" Matter*, 24 Loy. Consumer L. Rev. 505 (2012) 5
53 Fed. Reg. 50,097 (Dec. 13, 1988) 14
Federal Trade Commission, Staff Opinion Letter, 1992 WL 12622329 (Oct. 8, 1992) 15
H.R. Rep. No. 131, 95th Cong., 1st Sess. (1977) 18
Philip V. Martino, et al., *Foreclosure Issues in the Wake of the Subprime/Financial Crisis*, 11 Westlaw J. Bankr. 1 (Sept. 25, 2014) 5
Katherine Porter, *Misbehavior and Mistake in Bankruptcy Mortgage Claims*, 87 Tex. L. Rev. 121 (2008) 16
Reuters, *Two more Colorado foreclosure law firms charged with fraud* (Dec. 22, 2014) <https://tinyurl.com/more-Colo-fraud> 5
U.C.C. Art. 9 (2017) 12
U.C.C. § 9-608(a) 12
U.C.C. § 9-611(b) 12
U.C.C. § 9-614 12

INTRODUCTION

Non-judicial foreclosure easily qualifies as "debt collection" under the FDCPA. It directly attempts to collect a debt by sending notices that declare a default and announce the consequences of failing to cure. No one receives such a notice and reads it as anything but announcing a final chance to pay before the devastating prospect of losing one's family home. And if those notices fail to induce payment, the consumer's house is sold to pay the "debt[] owed." 15 U.S.C. 1692a(6). Put simply, "[w]hether through reinstatement or less directly through foreclosure sale and recovery of the proceeds, '[t]here can be no serious doubt that the ultimate purpose of foreclosure is the payment of money.'" *Alaska Trustee, LLC* v. *Ambridge*, 372 P.3d 207, 216 (Alaska 2016).

At some level, respondent understands all this, so it offers a series of workarounds to avoid the Act's plain language (and simple common sense). It says that state-mandated notices are somehow immune, but cannot identify any supporting textual hook in the statute. It claims that only "express" demands for payment are covered—no matter how obvious the message ("direct[] *or indirect[]*") might be. It argues that only an attempt to collect money *from the consumer* qualifies under the statute—an atextual addition that ignores the actual statutory language (which focuses on attempts to collect "debts owed," not the *source* of funds to pay those debts). And it insists that "enforcement of security interests" (a category phrased as a clear *inclusion*, not exclusion) is mutually exclusive with ordinary debt collection—even if the enforcement activity unambiguously qualifies as full debt collection under the Act. And, finally, in a last-ditch effort, it says that petitioner's reading would leave security enforcement a

null set—all while ignoring the entire industry of repossession agents who do exactly what Section 1692f(6) contemplates: "effect[ing] dispossession or disablement of property" *without* any corresponding attempt to collect a debt. (A car towed back to the creditor in the middle of the night, without any contact or communication, is both commonplace and obviously outside the FDCPA's main definition.)

The fact remains that Congress included a broad definition of debt collection, expressly contemplated foreclosure activity as "action on a debt," and provided consumer safeguards that are every bit as necessary in this vulnerable context (involving the consumer's most precious asset and essential well-being) as dunning letters over cable bills and credit cards. It is little surprise that respondent and the collection industry would prefer not to be held responsible for all-too-often mistakes in the foreclosure setting. But non-judicial foreclosure is unequivocally included under a straightforward reading of the Act, and there is no ground for asking the judiciary to rewrite the Act to accommodate the collection industry's policy preferences. The Tenth Circuit's contrary determination was wrong, and its judgment should be reversed.

ARGUMENT

NON-JUDICIAL FORECLOSURE CONSITUTES DEBT COLLECTION UNDER THE FDCPA

A. According To The Act's Plain And Ordinary Meaning, Non-Judicial Foreclosure Qualifies As "Debt Collection"

Non-judicial foreclosure readily qualifies as direct and indirect debt collection, and respondent's efforts to evade the obvious are unavailing.

1. a. According to respondent, all of its foreclosure-related notices were required by state law, and state-mandated notices are somehow excluded from the FDCPA. Respondent is wrong. Br. 23-24; accord U.S. Br. 11 ("[a]ctions that are legally required to enforce a security interest are not debt collection under the FDCPA").

First and foremost, respondent's position has absolutely no textual support. These notices are not exempt anywhere in the four corners of the Act, which is why neither respondent nor the government (nor any of the eight bottomside amicus briefs) could identify a single word, clause, phrase, subsection, or provision supporting their views. If Congress intended to exempt state-required notices, the exemption would appear textually in the Act itself. Neither respondent nor the government has offered any basis to presume that "statutorily required" notices are automatically exempt per some unspoken background principle of federal law.

Moreover, the text that respondent *omits* is all the more telling: the Act does indeed exempt a narrow set of *state-mandated notices*, but not these. Under Section 1692g(e), the Act's validation requirement is not activated by "any form or notice which [i] *does not relate to the collection of a debt* and [ii] is expressly required by * * * any provision of Federal or State law relating to notice of *data security breach or privacy*." 15 U.S.C. 1692g(e) (emphases added). This emphatically shows that Congress knew how to exempt "statutorily required" notices when it wished—and the very fact that it felt compelled to exempt *certain* notices suggests that *all other notices were already covered by the Act*. Otherwise, there would have been nothing to exempt. And even then, Congress still included such notices when they "relate[d] to the collection of a debt," confirming Congress's paramount focus on

capturing the full universe ("direct[] or indirect[]") of collection activity.

This pattern again reappears in the Act's other provisions, where targeted filings are excluded from coverage (*e.g.*, 15 U.S.C. 1692g(d); 15 U.S.C. 1692e(11)), and where Congress exempted state *"officer[s] or employee[s]"*—but not state-required *notices*—from the Act's purview (15 U.S.C. 1692a(6)(C)). Congress thus was well aware of the State's potential role in directing aspects of public and private conduct. But its careful accommodations did not excuse "collection" behavior simply because it was required by state law.

Nor is this legislative choice at all surprising. The entire premise of the Act was that *state law had proven insufficient*. As its preamble declared, the FDCPA redressed "inadequac[ies]" in state law that left consumers exposed to wrongful and abusive collection practices. 15 U.S.C. 1692(b). It would be self-defeating to withdraw the Act's protections merely because some "inadequate" state law happened to approve a "dunning"-esque disclosure.

And while respondent implicitly presumes that state-mandated notices fail to implicate the Act's concerns, actual experience proves otherwise. State-required forms can be virtually indistinguishable from classic dunning letters. New York law, for example, required a "rent demand" as "a condition precedent to a summary eviction." *Romea* v. *Heiberger & Assocs.*, 163 F.3d 111, 113 (2d Cir. 1998). California's non-judicial foreclosure notice declares a "default," threatens foreclosure, instructs how "to arrange for payment to stop the foreclosure," and even confirms the home "may be sold to satisfy [the consumer's] obligation" (*i.e., to obtain payment on the "debt[] owed,"* 15 U.S.C. 1692a(6)). United Trs. Ass'n Amicus Br. App. 1a-2a. And the notice in this case conveyed a materially identical message. Pet. Br. 15 (so establishing).

These letters pose the same dangers and risks whether they are sent voluntarily or mandated by state law. They put the same pressure on debtors, and they create the same openings for misstating the "amount" of the debt (15 U.S.C. 1692e(2)), inflating the amounts owed, or demanding unauthorized fees (15 U.S.C. 1692f(1))—as foreclosure mills have been repeatedly caught doing.[1] And the ordinary consumer reads and understands the notice the same way whether it was required by state law or not.

The statute does not say that conduct qualifying as debt collection is somehow *not* debt collection if it is compelled or required by state law; if the demand qualifies as a "direct[] or indirect[]" attempt to collect a debt, it constitutes debt collection under Section 1692a(6).[2]

---

[1] See, *e.g.*, Reuters, *Two more Colorado foreclosure law firms charged with fraud* (Dec. 22, 2014) <https://tinyurl.com/more-Colo-fraud> (reporting Colorado AG's suit accusing "the state's two largest" foreclosure firms of "defrauding homeowners, investors and taxpayers by grossly hiking costs and padding bills with unauthorized expenses"); Philip V. Martino, et al., *Foreclosure Issues in the Wake of the Subprime/Financial Crisis*, 11 Westlaw J. Bankr. 1, 2-3 (Sept. 25, 2014) (recounting "devastating" mistakes by "'foreclosure mill' law firms," including "[f]oreclosing on the wrong propert[ies]" and failing to "assure the accuracy" of "balance due calculations"); David A. Dana, *Why Mortgage "Formalities" Matter*, 24 Loy. Consumer L. Rev. 505, 512 (2012) (recounting San Francisco's audit of "power-of-sale" foreclosures and finding that "'clear violations of law' were not just commonplace but were considered the norm," casting doubt on 'the validity of almost every foreclosure it examined'").

[2] Nor can respondent or the government sidestep this problem by suggesting that any step required to enforce a security interest is exempt. As explained below, this wrongly presumes that security enforcement is excluded from the Act's coverage, even where the same conduct qualifies as classic debt-collection activity. If the action qual-

b. In an effort to dodge coverage, respondent argues its foreclosure notices did not include "express" demands for payment, which it says excuses itself from the Act. Br. 28. Both respondent's premise and its conclusion are wrong.

Its premise is wrong because these notices most assuredly do qualify as "express" demands for payment. They declare a default, state the amount owed, identify who to pay, provide contacts for "loss mitigation" (read: other ways to pay), and state the consequence of not paying. Pet. Br. 15; J.A. 37-45. There is zero chance of confusion: no normal consumer reads those statements and thinks the creditor is merely hoping to cut off "the equity of redemption." Contra Resp. Br. 4, 27. She instead understands the notice as the last chance to pay the debt before losing her home. Respondent cannot articulate any real-world difference between that message and one explicitly demanding payment.[3]

And respondent's conclusion is wrong because "nothing in [the Act's] language" *requires* an "express demand for payment." *McCray* v. *Fed. Home Loan Mortg. Corp.*, 839 F.3d 354, 359 (4th Cir. 2016). On the contrary, the Act covers "direct[] or indirect[]" attempts to collect debt, and sending an unmistakable message to pay (by declaring the

---

ifies as debt collection, *it is debt collection*. The Act does not give parties a free pass simply because their collection activity is also required to enforce a security interest.

[3] Respondent tries to avoid scrutiny by suggesting certain notices are not properly before the Court. Br. 30. Yet those notices were submitted (without objection) in the record below, and those notices mirror (according to respondent itself) the language required by Colorado law—which most assuredly *is* before the Court. While the initial notice itself qualifies as an obvious attempt to collect a debt, there is no basis for ignoring the other documents in the record.

consequences of *not* paying) qualifies at least as "indirect" debt collection: "a communication need not contain an explicit demand for payment to constitute debt collection activity." *McLaughlin* v. *Phelan Hallinan & Schmieg, LLP*, 756 F.3d 240, 245-246 (3d Cir. 2014).[4]

Respondent retorts that "indirect" collection under the Act focuses solely on "conduct that facilitates obtaining payment from the debtor." Br. 32 (discussing, *e.g.*, "gathering information"). But there is no basis for artificially cabining the Act's language that way. Respondent is correct that *some* indirect attempts may involve facilitating collection, but that hardly means *all* indirect attempts must serve the same function. It is the difference between necessary and sufficient. Congress could have said direct attempts or anything that "assists" such attempts (Br. 32), but it instead paired "direct[]" and "indirect[]" together, and thus put them on equal footing. The message is obvious: Congress sought to cover the broad universe of activity obtaining payment on "debts owed." 15 U.S.C. 1692a(6).[5]

---

[4] While the security interest itself may "give a debtor incentive to cure" (Br. 29), it is the *leveraging* of the security interest that constitutes direct or indirect debt collection. When the consumer is being left alone, there is no qualifying action. And where the security interest is enforced *without* communication or warning (as in the classic "repo" setting), there is no pressure to pay *because the consumer is not even aware of the repossession until it is over*. Respondent skips over these obvious differences.

[5] Respondent argues that its "notice of election and demand" was directed at the trustee, not petitioner. Br. 31. Yet "communication" under the Act captures "the conveying of information regarding a debt directly or indirectly to any person through any medium." 15 U.S.C. 1692a(2). Respondent knew the notice would reach petitioner (as state law required, see Colo. Rev. Stat. § 38-38-103), and the fact that it was "filed" with the public trustee does not change the substance of the message.

This conclusion not only promotes the Act's plain language, but it also avoids an administrability nightmare. Respondent says that it is easy to tell the difference between collection demands and mere informational "notices." Yet no normal person receiving these notices thinks the creditor does not want the money. And declaring the consequence of failing to pay is functionally indistinguishable from a demand to pay. If the FDCPA nevertheless includes one and excludes the other, courts will waste endless time parsing the language of each notice and searching for impossible distinctions between "demands" and simple "heads-ups." Such a bootless exercise promises uncertainty for all sides, and it fails to honor the FDCPA's fundamental purpose: protecting consumers from misconduct and abuse, however clever the notice's wording might be.

c. At a minimum, non-judicial foreclosure "indirectly" collects the "debt owed" by selling the house to pay the debt. *E.g.*, *Ambridge*, 372 P.3d at 216 ("foreclosing on property, selling it, and applying the proceeds to the underlying indebtedness constitute one way of collecting a debt—if not directly at least indirectly"). Indeed, respondent's own filing with the public trustee demanded selling the "property *for the purpose of paying the indebtedness*." J.A. 40 (emphasis added); see also Colo. Rev. Stat. § 38-38-111. And respondent's own amici are candid about the result: non-judicial foreclosures "pursu[e] proceeds from a trustee sale" to "reduce the debt owed on the mortgage." Legal League 100 Amicus Br. 3.[6]

---

[6] Respondent quibbles with petitioner's use of the definition from *Heintz* v. *Jenkins*, 514 U.S. 291 (1995), saying that petitioner "conflates" liquidating the debt with liquidating the collateral. Br. 33; see also Pet. Br. 19 ("collecting a debt means 'to obtain payment or liqui-

In response, respondent argues that foreclosure is not debt collection because the sale proceeds come from third parties, and "collecting a debt" means "obtaining a payment of money *from the debtor*." Br. 17 (emphasis added). Respondent has plucked the italicized phrase out of thin air. It surely does not appear anywhere in the statutory definition, which simply focuses on the "debts owed." It does not say, for example, "attempts to collect *from the debtor*." It is thus irrelevant "that the money collected at a foreclosure sale does not come directly from the debtor." *Ho* v. *ReconTrust Co., N.A.*, 858 F.3d 568, 578 (9th Cir. 2017) (Korman, D.J., dissenting). While the object of the collection must be satisfying the "debts owed," it can be satisfied via any source.

And it is little wonder Congress framed the statute this way. A contrary reading would expose a debtor's parents, spouse, best friends, and others to dunning by debt collectors. The Act's surrounding provisions confirm this view (see Pet. Br. 20 & n.10), and respondent has offered no reason to graft its proposed limitation onto the Act's plain text. Indeed, as a matter of everyday usage, anyone watching their house sold at foreclosure, with the proceeds automatically dedicated to pay off the debt, would say the foreclosure was used to pay the "debts owed."[7]

---

dation of it'") (quoting *Heintz*, 514 U.S. at 294). What respondent ignores is that "liquidating the debt" *includes* liquidating the collateral *to liquidate the debt* (i.e., "'to extinguish' it," Resp. Br. 33). The ultimate import is the same: the asset is liquidated to satisfy the amount owed. *E.g.*, *Shapiro*, 823 P.2d at 124 ("a foreclosure is a method of collecting a debt by acquiring and selling secured property to satisfy a debt"). In any event, non-judicial foreclosure satisfies respondent's own dictionary reading: selling the house "obtains payment" on the consumer's debt. Br. 16-17.

[7] The fact that the "debt" is an "obligation of a consumer to pay money" (15 U.S.C. 1692a(5)) does not suggest otherwise. Contra

In sum, it blinks reality to say that the sale is not an attempt (indirect if not direct) to "obtain payment" for the debt.[8]

2. a. According to respondent and the government, petitioner's reading of the statute would erase the FDCPA's clear distinction between ordinary debt collection and enforcing security interests. As they see it, if enforcing a security interest is always debt collection, then the additional definition is "superfluous." Resp. Br. 15, 29; U.S. Br. 12, 15.

Their reading is wrong. First, under the plain text, the two definitions are not mutually exclusive. *E.g.*, *Piper* v. *Portnoff Law Assocs., Ltd.*, 396 F.3d 227, 236 (3d Cir. 2005). The language does not *exclude* qualifying conduct merely because it also relates to a security interest; on the contrary, the statute unequivocally *includes* the extra behavior ("such term *also includes*"). See *Mount Lemmon Fire Dist.* v. *Guido*, 139 S. Ct. 22, 25 (2018) ("'also' is a term of enhancement; it means 'in addition; besides' and 'likewise; too'"). And that fits Congress's apparent objectives: If the conduct falls within the main definition, it is

---

Resp. Br. 34. That defines *what* kind of debts are "debts owed"; it does not define *from whom* the payments can be obtained. Respondent's proposed loophole has no support in the statute.

[8] Respondent argues that, under petitioner's reading, even a pawn shop would be considered a debt collector. Br. 34-35. This misses the mark. First, a pawn shop is usually the *original creditor*, so it escapes coverage for that reason. Second, when a pawn shop sells collateral by a date-certain, it is not engaging in any further communication with the consumer; it is simply disposing of the collateral. So even if the action constitutes "debt collection" (because it is satisfying the debt), the actual conduct is not covered by the FDCPA—absent interaction with the consumer, the FDCPA's substantive prohibitions remain unactivated. Finally, if the pawn shop does give advanced warning that it will sell the watch ("pay by Friday or I sell"), it is indeed engaged in obvious debt collection.

subject to the full Act, and nothing in the language says otherwise. It makes little sense to exclude activity Congress saw reason to regulate merely because it also involves a security interest.

Respondent also suggests its understanding "accords with ordinary usage" (Br. 18), but that is wrong. Respondent's "Vice President" example works only because the Vice President cannot also be a sitting Senator; the two offices are mutually exclusive. Here, by contrast, one can both collect a debt *and* enforce a security interest. And as for respondent's "veteran" example (Br. 18), surely respondent is not suggesting that a veteran in "active service" who is *also* a "surviving spouse" is thereby excluded from qualifying as a "veteran" for all purposes. Respondent's example thus proves *petitioner's* point.

b. Respondent and the government respond that this plain-text reading renders the additional definition surplusage. This is baseless. Tellingly, neither addresses the definition's most obvious and common application: "repo" agents who do nothing more than show up in the middle of the night and tow a car back to the creditor's premises.

Those people have one role in the process, and their conduct is policed by a single subsection that has direct application to their conduct—ensuring they do not take property without permission or make unlawful threats. 15 U.S.C. 1692f(6). That activity does not implicate any of the Act's broader concerns. There is no negotiation or requests for payment. Indeed, the entire goal of most repossessions is to avoid contact entirely. The agent's job is not to try one last time to collect the debt or even provide a final warning to pay while waiting outside by the car. The agent shows up, takes the car, and returns it to the creditor. *E.g.*, *James* v. *Ford Motor Credit Co.*, 47 F.3d 961,

962-963 (8th Cir. 1995). There is no overlap with the FDCPA's main definition.[9]

The government, however, argues that even this limited activity would qualify as full "debt collection" under the FDCPA, because the U.C.C. requires creditors to warn debtors before selling repossessed cars. Br. 27.

But the government ignores what the U.C.C. actually says. It does not require *the same person who takes the car* to notify the debtor. On the contrary, it puts that burden on the "secured creditor." U.C.C. § 9-611(b). And, indeed, it stands to reason that the person towing the car or changing the locks is not the same person trying to liquidate the car (or re-rent the apartment) to pay the debt. The government simply assumes—without any obvious foundation—that the "repo man" (and not the creditor or other specialized entity) is the one sending the *post*-repossession notices.

And the government's argument even fails on its own terms. It most assuredly *is* debt collection for an entity to demand payment one last time before selling the car. See U.C.C. § 9-608(a) (explaining that the security interest "secures payment or performance of an obligation," and authorizing "cash proceeds" to "satis[fy]" the "obligation secured by the security interest"); U.C.C. § 9-614 ("[y]ou can get the property back at any time before we sell it by paying us the full amount you owe"). So if the "repo" agent decides to send the notice on their own, they indeed qualify under the Act's main definition and must comply with

---

[9] Indeed, the scope of Section 1692f(6) further reaffirms the plain-text reading of the statute. Traditional "repos"—taking cars in the middle of the night—match perfectly with "dispossession or disablement." It is little wonder that the single subsection applied to "security enforcers" also happens to exactly mirror traditional "repo" activity. This shows the obvious scope that Congress had in mind for the additional definition.

the Act's full prohibitions (including the requirements that they correctly state the amount owed, avoid demanding unauthorized charges, etc.).

c. According to the government, petitioner's reading artificially restricts the FDCPA's additional definition to a "cryptic euphemism for one specific form of self-help," even though the definition's text naturally applies to "enforcement" of all "security interests." Br. 29. The government is confused.

No one says that non-judicial foreclosure is not the "enforcement of a security interest." The point is that it is not *only* the enforcement of a security interest. A foreclosure *does* qualify as security enforcement, but it *also* qualifies as debt collection. And the statute nowhere says that all enforcement-related conduct is immune from regulation if it *also* qualifies under the main definition ("collecting or attempting to collect, directly or indirectly, debts owed").

So petitioner's point is not that the additional definition is artificially limited; his point is that the additional definition is not rendered surplusage (or anything close) due to the entire industry of repossession agents who qualify "solely" under narrower definition.

d. Respondent argues that its interpretation is consistent with the common law's distinction between "in rem" and "in personam" actions. Br. 21.

The short answer is that if Congress wanted to strictly adhere to those categories, it would have copied over those terms into the FDCPA. But that is plainly not what Congress did. It broadly defined debts to included "any" obligation, not just unsecured obligations. 15 U.S.C. 1692a(5). It specifically covered actions to enforce real-property interests. 15 U.S.C. 1692i. And it expressly referenced mortgage debts in the key legislative history. Pet. Br. 23-24. There is no ground for creating a huge loophole

in the Act for in rem proceedings. *E.g.*, *Kaymark* v. *Bank of Am., N.A.*, 783 F.3d 168, 179 (3d Cir. 2015).

Respondent briefly suggests a similar parallel to bankruptcy law. Br. 21 n.4. But this parallel is not parallel at all. The different treatment of secured and unsecured debts is a direct product of the Bankruptcy Code itself. It textually draws those distinctions and does so for policy reasons, balancing the competing interests of debtors and creditors. *Johnson* v. *Home State Bank*, 501 U.S. 78, 82-84 (1991). Indeed, if anything, the Code shows that Congress knows exactly how to exclude secured interests from general provisions (like the Code's discharge) when it so wishes.

3. Respondent argues that its position is consistent with the government's past enforcement position (Br. 23-24), but that is wrong. First, the FTC's formal staff commentary directly supports *petitioner*. It confirms that parties who enforce security interests but *also* "otherwise fall within the [main] definition" are indeed subject to the FDCPA's full scope. 53 Fed. Reg. 50,097, 50,108 (Dec. 13, 1988). More importantly, the same commentary also confirms that the Act covers "a party who is named as a debtor's trustee solely for the purpose of *conducting a foreclosure sale* (i.e., exercising a power of sale in the event of default on a loan)." *Id.* at 50,103 (emphasis added). That describes this issue exactly—and the FTC's position is impossible to square with respondent's position.

Moreover, while the FTC's informal staff letter does suggest an exclusion for state-mandated notices (Resp. Br. 23-24), the staff's opinion was divorced from the text, contained no real analysis of any kind, and failed to justify the proposed exclusion. See Federal Trade Commission, Staff Opinion Letter, 1992 WL 12622329, at *2-*4 (Oct. 8,

1992). Just as in *Heintz*, "nothing either in the Act or elsewhere indicat[es] that Congress intended to authorize the FTC to create this exception from the Act's coverage—an exception that * * * falls outside the range of reasonable interpretations of the Act's express language." *Heintz*, 514 U.S. at 298.

Finally, while the Bureau of Consumer Financial Protection now supports respondent, its flip-flop is entirely unconvincing. The Bureau acknowledged its past contrary position in *Ho* (U.S. Br. 22 n.6), but (inexplicably) ignores *eight years* of consistently supporting petitioner's position. Indeed, the Bureau had adopted the opposite position before two other circuits (the Second and Eleventh), and repeated the same position in its statutorily required 2013 annual report (see 15 U.S.C. 1692m(a); see also Consumer Financial Protection Bureau, *Fair Debt Collection Practices Annual Report 2013* 27-28 (Mar. 20, 2013)).

Until this case, the Bureau had long recognized the essential need to protect consumers from misconduct and mistakes in the foreclosure context. The government was right before; it is wrong now.

B. The FDCPA's Context And Purpose Confirm That Non-Judicial Foreclosure Is Subject To The Act

The FDCPA's context and purpose reaffirm that nonjudicial foreclosure qualifies as debt collection. Pet. Br. 21-23.

1. As petitioner already explained, Section 1692i confirms that Congress understood foreclosures were subject to the Act's general provisions. Pet. Br. 21. Respondent's response (Br. 37-38) wholly misses the point.

First, under its plain language, Section 1692i establishes that an "action to enforce an interest in real property" *is* "an[] action on a debt." 15 U.S.C. 1692i(a)(1) (emphasis added). Congress thus understood foreclosures were not merely targeting security interests, but in fact

targeting the underlying debt itself. Congress did not have to repeat the phrase "debt collection" to make its intention clear. *E.g.*, *Cohen* v. *Rosicki & Assocs., P.C.*, 897 F.3d 75, 83 (2d Cir. 2018).

Moreover, respondent overlooks that Congress also did not repeat "debt collection" in Section 1692i(a)(2), which most certainly covers the heartland of collection activities (including actions on a "contract"). The fact that Congress introduced both categories with the same prefatory language—"Any debt collector who brings any legal action on a debt against any consumer"—shows that Congress saw an obvious equivalence between the two types of actions. And it described each one, again, as an "action on a debt," not mere security enforcement.

Finally, it is does not matter whether non-judicial foreclosures are technically subject to this provision. Contra U.S. Br. 31-32. What matters is that Congress understood *foreclosures* as debt collection—which is why they were regulated under the Act's general prohibitions.[10]

2. Respondent and its amici repeatedly suggest that there is no real need for the FDCPA in the foreclosure context. But the urgent role for the Act is compelling and obvious.

Respondent simply ignores the long history of misconduct in the foreclosure arena. As noted above, the area has been subject to documented abuse. Foreclosure mills have inflated fees, charged unauthorized amounts, and even targeted the wrong people (while foreclosing on the wrong house). See also, *e.g.*, Katherine Porter, *Misbehavior and Mistake in Bankruptcy Mortgage Claims*, 87 Tex. L. Rev. 121, 126 (2008) ("Errors or overcharges increase the cost of home ownership and expose families to the risk of

---

[10] In any event, *Shapiro* already held that Colorado non-judicial foreclosures are indeed covered by the FDCPA. 823 P.2d at 124.

wrongful foreclosure."). State laws have not been a perfect cure or deterrent to these problems. Indeed, Colorado itself has recently targeted the biggest Colorado debt-collection firms for their abuse and errors in processing non-judicial foreclosures. See p. 5 n.1, *supra*.

Congress enacted the FDCPA to create a federal baseline to protect consumers from precisely these kinds of mistakes. See, *e.g.*, 15 U.S.C. 1692e(2); 15 U.S.C. 1692f(1). The procedures in place to validate debts (15 U.S.C. 1692g) encourages accuracy, and the Act's substantive prohibitions discourage and remedy abuse. If respondent and their amici truly believe that the FDCPA's safeguards are unnecessary in the one context with the greatest possible effect on families and communities, their proper audience is Congress, not the courts.

C. The FDCPA's Legislative History Further Confirms That Non-Judicial Foreclosure Qualifies As Debt Collection

The FDCPA's legislative history confirms what its text already makes clear: foreclosures are covered by the FDCPA.

First, respondent has no answer for why Congress would specifically discuss mortgages without mentioning that it was silently excluding the primary means of obtaining payment when mortgage debt goes into default. See Pet. Br. 23-24. If Congress did indeed intent to exclude foreclosures from the Act, one would expect to see some commentary, somewhere, to that effect. And that is especially so where one of the enacted provisions (Section 1692i) directly targets foreclosure proceedings. Respondent has no explanation for why this particular dog did not bark.

Second, respondent suggests that the FDCPA was a product of compromise that left security enforcers (how-

ever they might otherwise qualify under the main definition) subject "only" to the "limited" focus of Section 1692f(6). Br. 25-26. The clear legislative compromise, however, was *not* to exempt security enforces who are *also* debt collectors; it was to include those who *only* enforce security interests but subject them solely to one subsection (not every subsection) of the Act. That compromise reflects the differences between the bills and (more importantly) reads the *enacted* text to mean what it so plainly says. Respondent's contrary speculation cannot account for the final bill's actual language.

Finally, respondent argues that Congress was obviously not focused on foreclosures because it mentioned many States with "'no debt collection laws,'" whereas *every* State had laws regulating foreclosures. Br. 26-27.

Respondent plainly misreads this statement. The legislative commentary focused on laws "regulating debt collection per se." H.R. Rep. No. 131, 95th Cong., 1st Sess. 3 (1977). There is an obvious difference between a scheme targeting debt collectors *as such* and one incidentally regulating activity where debt collectors may practice. Every State, for example, presumably also had laws prohibiting assault and mail fraud, but no one confuses those prohibitions with a debt-collector-specific code of conduct. Congress pointed out the absence of the latter, not the former.

As the legislative history made clear, Congress targeted debt-collection misconduct in its many forms; there is no indication that it felt foreclosures—the area, again, with potentially the most devastating effect on American consumers and families—should fall outside its baseline consumer protections.

D. The FDCPA Does Not Intrude In Any Meaningful Way On Any Legitimate State Interest

According to respondent, mortgage foreclosure is a traditional state interest, and the FDCPA does not contain a sufficiently clear directive to displace state law in this area. Br. 40-49. Respondent is wrong.

1. Contrary to respondent's contention, this is not a core area of traditional state concern. Foreclosures implicate core economic transactions typically involving national banks and enormous implications for interstate commerce—which presumably explains Congress's heavy regulation in this very area (including RESPA, TILA, the Bankruptcy Code—and, in fact, the FDCPA (see 15 U.S.C. 1692i)). It is odd to presume that Congress decided to draw the line at the State's interest in non-judicial foreclosure (at least for those States using the procedure).[11]

Respondent's contrary position overreads this Court's decisions. In *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531 (1994), for example, the Court did not hold that foreclosure per se was a traditional state interest; instead, it endorsed "the essential sovereign interest in the security and stability of title to land." 511 U.S. at 545 n.8. The FDCPA does not interfere with that interest at all; it does not permit courts to enjoin foreclosures or unwind transactions. It simply requires professional debt collectors to honor a baseline set of acceptable practices.

And, in any event, to the extent a clear statement is required to "intrude" in this area, Congress was emphatically clear in targeting a broad range of debts and

---

[11] While the presence of federal regulation does not necessarily imply the absence of a state interest (Resp. Br. 46), when an area is already covered by an extensive network of federal regulation, it surely cuts against the presumption that Congress embraced a hands-off approach.

preempting any contrary state laws. See 15 U.S.C. 1692n. It is odd for respondent and the government to insist upon a clearer statement in an Act with that kind of express preemption provision.[12]

2. In any event, respondent's asserted conflicts are weak, overstated, and unproven.

Initially, for all the claims of chaos, there has been no obvious effect on any State's foreclosure system. Neither respondent nor any of their amici could document any true interference, despite the FDCPA's applicability in this context for years in multiple jurisdictions. If the two systems were truly incompatible, one would expect to see foreclosure systems grind to a halt. Instead, actual "[e]xperience suggests otherwise." *Mount Lemmon*, 139 S. Ct. at 27.

Moreover, despite all the claimed conflicts, the list of complaints reduces to a small handful of basic provisions, each with a number of easy outs.

First, parties can overcome consent requirements to publication and personal service (15 U.S.C. 1692c) by securing an agreement (in the original grant) to provide all necessary consents in the event of foreclosure. And if parties resist such a provision, the foreclosure can still proceed in line with state law on "the express permission of a court of competent jurisdiction." *Ibid.* Courts issue warrants all the time, and Colorado itself already has a judicial procedure in place for Rule 120 hearings. At the very most, these minimal burdens would provide consumers a

---

[12] Nor is *Sheriff* v. *Gillie*, 136 S. Ct. 1594 (2016), to the contrary. That case involved the State's own activities in collecting its own debts, not state regulation of third parties in core economic transactions. See 136 S. Ct. at 1602.

modicum of judicial review (to ensure accuracy and fairness) before publicizing their defaults to their friends and neighbors.

Second, debt collectors are permitted to invoke available procedures even where consumers refuse further communication. *Heintz* so held in a related context (514 U.S. at 296-297), and respondent offers no reason the same solution is unworkable here.

Third, the debt-validation process (15 U.S.C. 1692g) requires minimal information to confirm that the claimed default is accurate and the alleged creditor is legitimate. Any party seeking to take away someone's house ought to have this information available *before* starting the process; there is no reason that assembling this basic information should prove insurmountable.

Finally, if Congress finds these tiny inconveniences too much, it can always amend the FDCPA—as it has repeatedly done in the past—to exempt foreclosure notices and publications from the Act's scope. Cf. 15 U.S.C. 1692e(11), 1692g(d). That type of precision amendment makes more sense than tossing out the entirety of the FDCPA to avoid a few marginal (and highly debatable) conflicts. Respondent is wrong to pick up a sledgehammer when a scalpel will do.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

DANIEL L. GEYSER
Counsel of Record
GEYSER P.C.
One Energy Square
4925 Greenville Ave., Ste. 200
Dallas, TX 75206
(214) 800-2660
daniel.geyser@geyserpc.com

DECEMBER 2018